IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 19450 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE JAYANT PATEL

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1 Whether Reporters of Local Papers may be allowed to see the judgment?

2 To be referred to the Reporter or not?

3 Whether their Lordships wish to see the fair copy of the judgment?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder?

5 Whether it is to be circulated to the civil judge?

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LAXMINARAYAN CO OP HOUSING SOC. LTD
Versus
STATE OF GUJARAT AND OTHERS

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Appearance :
MR RA PATEL for the Petitioner
MR SATYAM CHHAYA, AGP for Respondent Nos.1 and 3
MR HS MUNSHAW for Respondent No.2
MR RASMIN CHHAYA with MR VC VAGHELA for Respondent No.4
MR JAYRAJ CHAUHAN for Respondent Nos.5 and 6

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CORAM : HONOURABLE MR.JUSTICE JAYANT PATEL

Date : 07/03/2007

ORAL JUDGMENT

1. The short facts of the case are that the petitioner is one Laxminarayan Co-operative Housing Society, which is a residential society situated on the land bearing

survey No.628/2 and survey No.629/2. It appears that formerly, the said land was agricultural land and thereafter, the permission for non-agricultural use was applied and was granted on 15.02.1989. It appears that over a part of the land, the petitioner society is established. However, over roughly half portion of the land, since the land was vacant it is purchased by respondent No.4, Market Committee. It appears that in past, at the stage when the Market Committee had applied for permission for construction of establishing market yard over the land in question, the petitioner had preferred Special Civil Application No.8345 of 2001 and in the said petition, the direction was given by this Court to AUDA, respondent No.2 herein to give the opportunity to the petitioner and to pass the appropriate order. As per the petitioner, inspite of the same, thereafter, the permission came to be granted by respondent No.2 to the Market Committee for construction of the shops and others for market yard. The petitioner preferred application under Section 6-B of the Gujarat Town Planning and Urban Development Act (hereinafter referred to as, “the TP Act”) before the District Collector and the District Collector, Gandhinagar vide order dated 28.03.2005 dismissed the appeal and confirmed the permission granted by AUDA. It appears that the

petitioner further carried the matter before the State Government against the order of the Collector and vide order dated 26.08.2005, the State Government dismissed the appeal and confirmed the order of the Collector and it is under these circumstances, the present petition.

2. It may be recorded that in the present petition, vide order dated 26.12.2005, the interim relief was refused against which the petitioner had preferred Letters Patent Appeal No.1809 of 2005, which came to be dismissed vide order dated 29.12.2005 passed by the Division Bench. The matter was further carried before the Apex Court in Special Leave to Appeal (Civil) No.2637 of 2006 and vide order dated 04.09.2006, the Apex Court dismissed the Special Leave Petition, however, observed for requesting the High Court to consider the matter expeditiously and as the note was filed on behalf of the petitioner, the main matter itself is finally heard.

3. Heard Mr.R.A.Patel, learned counsel for the petitioner, Mr.Satyam Chhaya, learned Assistant Government Pleader for respondent Nos.1 and 3, Mr.Munshaw, learned counsel for respondent No.2, Mr.Rasmin Chhaya with Mr.Vaghela, learned counsel for respondent No.4 and Mr.Chauhan for respondent Nos.5 and 6.

4. The aspect which mainly deserves consideration is the GDCR and the permissibility of the construction. The applicability of GDCR to the construction for which the Market Committee applied is not in dispute. It is also not in dispute that the land is in the residential zone and non-agricultural use permission is also granted in residential zone. As such, barring the area in question, the land is surrounded by the residential societies. The Use Zone Table of GDCR vide No.1(a) provides for Residential Zone (1) Residential Zone-I (b) Residential Zone-II. Type of development for which the zone is primarily intended does provide for commercial use as shopping centre/commercial centre, restaurant, hotel, hostel, indoor hospital, nursing home, surgical hospital etc. subject to provisions of regulation No.12.1. However, in the very table, vide column No.5, type of development which may not be permitted reads as under:

> "Obnoxious and hazardous uses, steel stock yard, truck terminal, saw mill, timber mart, ice factory and cold storage, junk yard, non-obnoxious and non-hazardous industries, wholesale market, ware houses, storage of perishable and inflammable goods, hospital for infectious and contagious diseases, mental hospital, jail etc."

The aforesaid are not permitted as per the GDCR in residential Zone – I or Zone-II. It is not in dispute

that the land is not situated in the residential zone nor it is in dispute that the aforesaid GDCR are not applicable.

5. On the plain and simple reading of GDCR, it appears that the development of the land for wholesale market in the residential zone is not permissible. The permission has been granted by respondent No.2 for construction of a vegetable market yard of respondent No.4 and the said aspect is not in dispute. Therefore, the question which may incidentally call for consideration, would be whether establishing of a vegetable market yard by a Market Committee can be said as wholesale market or not.

6. It appears that the examination of the aforesaid aspects may call for the reference to the provisions of the Gujarat Agricultural Produces Market Act, 1963 (hereinafter referred to as, “the Act”) under which respondent No.4, Market Committee is constituted and does discharge its obligation as provided under the Act read with the Rules. As per the scheme of the Act after following the procedure as required under Section 5, a declaration is required to be made for the market area, which is to remain under control of the Market Committee. Section 7 provides for a market yard, which includes the principal market yard, sub-market yard, if any, and

market proper for the market area which is declared earlier under Section 6 of the Act. Section 8 provides for prohibition of operation in the market area, except in accordance with the conditions of the licence granted under the Act. Section 9 provides for a Market Committee for every market area. Section 28 of the Act provides for power of the Market Committee to levy and collect fees on the agricultural produce brought or sold in the market area, subject to the provisions of the Rules prescribing the maximum and minimum limit. Rule 48 provides for collection of the market fees and Rule 49 provides for recovery of the market fees by the Market Committee.

However, pertinent aspect is that such recovery of the market fees is payable as soon as the agricultural produce is brought into the principal yard or sub-market yard or market proper or market area and such fees are recoverable from the purchaser. Therefore, as per the scheme of the Act, whenever agriculturist bring the agricultural produce, if any person is desirous to purchase the said agricultural produce, the operation has to be in the market area as per the provisions of the Act read with the Rules and also subject to the licence. Further, the fees are payable whenever the goods are brought into the market yard or market proper or market

area and such fees are to be paid by the purchaser. It may be that in a given case, the direct consumer of the agricultural produce desirous to use the produce in bulk, may purchase the agricultural produce from the market yard, but generally, such agricultural produces are to be purchased by the person, who are dealing in such agricultural produce to be sold subsequently by such person to the ultimate consumer of such produce. The essential purpose of establishing the market yard is to regulate the wholesale purchase of the agricultural produce in the market yard and not the retail purchase or sale of agricultural produce in a market yard. As per the scheme of the Act, it appears that the quantity is sold in bulk by the agriculturist and is purchased in bulk by the purchaser. In the market yard, the operation of the transactions are not for retain business, but there is going to be wholesale purchase and sale of the agricultural produce brought by the agriculturist.

7. It is not in dispute that the construction for which the application was made by the Market Committee was not for establishing the market yard and it is rather an admitted position and is apparent from the record that the shops and the stalls are to be constructed for establishing the market yard in furtherance of the of the activity of the Market Committee, respondent No.4 herein.

Therefore, the permission for construction of vegetable market yard would fall in the category of wholesale market, may be wholesale vegetable market for which the development is not permitted over a land in residential zone.

8. Mr.Chhaya, learned counsel appearing for the Market Committee attempted to submit that even in the vegetable market yard, those who are desirous to purchase in bulk as an ultimate consumer, may be like hotelier, restaurant, do come for purchase the vegetables in bulk and therefore, the same is a purchase by the ultimate consumer and hence, can also be said as a retail sale and therefore, he submitted that it is not that in every case, there is going to be wholesale of the vegetables only.

In my view, merely because in a given case the purchase is by the ultimate consumer, would not change the nature of the market or sale. It cannot be conceived that in a market yard if the agriculturist comes with the agricultural produce in bulk quantity, he would sale the vegetables like a Vegetable Shop Merchant to each consumer in a very small quantity. Moreover, in any case, even if one is the ultimate consumer, it would be a singular or exceptional transaction, otherwise generally,

the purchasers, who are to come for purchase the agricultural produce in a market yard, would be those persons, who are to buy the agricultural produce and thereafter, to sale in retail to the ultimate consumer. Therefore, considering the activity to be undertaken in the market yard of a Market Committee, it can be termed as wholesale market. Even otherwise also, the word 'wholesale market' would mean where the quantities are to be sold in bulk and such wholesale is different and in contradistinction with the retail market. A mere singular or exceptional transaction would not change the nature of the market or the nature of the transaction of wholesale which are to take place at the market yard and therefore, the said contention raised by Mr.Chhaya cannot be accepted.

9. Learned counsel appearing for the petitioner as well as respondent Nos.5 and 6 made strenuous efforts to submit that over a part of the land in question, on the back side as well as well as after the expiry of the plot, which is in control of the Market Committee, they are all residential societies. It is also not in dispute that the land is in a residential area and is falling in the residential zone and therefore, it was submitted that if the Market Committee is allowed to operate its market yard by constructing the market yard, there will be heavy

vehicular traffic, even the ingress and outgress of the residents of the residential society of the petitioner and respondent Nos.5 and 6 would be disturbed and it will create nuisance so far as the residents of the area including residents of the petitioner society are concerned. It was also submitted on behalf of the petitioner and respondent Nos.5 and 6 that if the vegetables are permitted to be stored in the market yard, it may also create air pollution since the vegetables basically are perishable commodities and if the sale does not take place immediately, it would create pollution since the vegetables would be spoiled or its quality may start deteriorating. It was also submitted on behalf of the petitioner that warehouses are also even otherwise not permissible and therefore also, the construction permission ought not to have been granted by respondent No.2 to the Market Committee.

10. Whereas, on behalf of respondent No.2 it has been submitted that as the Government has permitted establishing the market yard over the particular land, the permission is granted for construction keeping in view the said aspects. It has also been submitted on behalf of the Market Committee that earlier when the area was to be declared as that of the market area as well as market yard, no objections were filed by the petitioner

herein and therefore, once the ares is declared as market area and the the market yard is to be established, the petitioner cannot legitimately raise such grievance that the construction of market yard is not permissible over the area and therefore, the decision of the authority for grant of permission cannot be said to be illegal. It was also submitted that only plot area and the shops are to be constructed and there is no construction for storage of vegetables and therefore, the same cannot said as warehouse as sought to be canvased on behalf of the petitioner.

11. In my view, the principal aspect deserves to be considered and as observed hereinabove, is the permissibility of such construction in a residential zone. As per GDCR, if GDCR prohibits the development, even respondent No.2 has no authority to grant such permission for development. Further, the aspects of nuisance or pollution in air or the disturbance due to heave vehicular traffic in the residential area on account of operation of the market yard, are the incidental aspects, which may be required to be considered. It can hardly be disputed that a pure commercial activity in a residential area, would not create disturbance in a residential area or residential locality. However, certain commercial activities are

such which may add as facility to the residents of the area. Certain activities may be such which may also be required in a residential area, but at the same time, a commercial activity or certain operation for exclusive commercial use of the property, which may create nuisance or disturbance to the residents of the area may not be permitted as such. Keeping in view the larger principals, generally the GDCR are being framed and even in the residential zone, certain commercial use and the activities are permitted, but as observed earlier and reproduced hereinabove, certain type of development is not permitted in the residential zone, which includes establishment of wholesale market. Therefore, when by subordinate legislation of GDCR, it has expressly prohibited, for establishment of wholesale market in a residential zone, no further discussion may be required on the aspects on nuisance or air pollution. The use of the word “may” is to be treated as to be followed in all development permissions, which is not to be permitted in residential zone I and II. So far as the use of the shops for godown purposes is concerned, in my view, the same would also lose its importance in view of the findings recorded hereinabove that the construction of a vegetable market yard by the Market Committee can be termed as wholesale market irrespective of the fact that

whether the vegetables are stored or not.

If the matter is examined in light of the aforesaid observations for its legality and validity of permission granted by respondent No.2 read with the order passed by the Collector and its confirmation thereof by the State Government, it appears that so far as respondent No.2 is concerned, it has not all considered the aspect that the development for wholesale market is prohibited by express provisions of GDCR referred to hereinabove. So far as exercise of the power by the District Collector and the State Government is concerned, both have committee *ex-facie* jurisdictional error inasmuch as, the principal question which was required to be examined for its legality and validity of the permission granted by respondent No.2 as to whether GDCR permits development and if the answer is no, the permission granted by AUDA could not have been confirmed. The perusal of the order passed by the District Collector and the State Government shows that it has misdirected itself on the aspect that when the preliminary notification was published by the Director of Agricultural Manufacture and Rural Finance for declaration of the area and for regulation of the purchase and sale of the vegetables in the area, no objections were filed and therefore, the objections are found as not maintainable.

In my view, even if the area is declared under APMC Act as the market area or a market yard, it cannot be termed as giving go-bye to the requirements to be followed as per the provisions of the TP Act. At the most, such a declaration for the market area or a market yard can be termed as the declaration for regulating purchases and sales of the vegetables, but the same cannot be termed as permitting construction under the Act though it is expressly barred as per the GDCR. It appears that both the authorities have misdirected itself on the jurisdiction to be exercised while examining the legality and validity of the permission granted by respondent No.2 to respondent No.4 for construction of the market yard and hence, as the jurisdictional error is committed by both the authorities, it would be a case to interfere under Article 226/227 of the Constitution with the order of the lower authorities.

12. It may be recorded that the statement was made at the bar by the learned counsel appearing for respondent No.4, Market Committee that since the interim order was not granted in the petition, the Market Committee has proceeded with the construction. However, no building use permission is granted by respondent No.2 nor the actual use of the market yard is started by the Market Committee and the building is at under construction.

Learned counsel for the Market Committee also submitted that if the construction is not allowed to be used for the market yard, the Market Committee will suffer huge loss of about more than 2 crores of rupees and therefore, considering the peculiar circumstances, this Court may allow the permission granted by respondent No.2 to operate and the Market Committee may be permitted to use the construction for the vegetable market.

It appears that the petitioners who are residential societies are agitating the issue immediately when it come to their knowledge that the land is sold to the Market Committee and the Market Committee is to establish the vegetable market since 2001. The challenge was also brought to this Court being Special Civil Application No.8345 of 29001 and the Market Committee has proceeded with the construction with the full and conscious knowledge that permission by AUDA is under challenge before the appropriate authority and ultimately before this Court in the present proceedings. If the construction is made in contravention to the express provisions of GDCR, no additional benefit can be claimed or conferred in favour of respondent No.4, Market Committee so as to permit the Market Committee to commit breach and defiance to GDCR. It is true that when it is a matter of public body or the question is for saving

loss to the public money, the Court may take lenient view. However, if the activity is prohibited by the express provisions and the statute and the Market Committee has proceeded with the construction with full and conscious knowledge of the pendency of the litigation, in a matter where the aspect is also touching to the peace and convenience of the residents of the locality in the residential area, I find that it is not a case where the exception should be made for respondent No.4, Market Committee, which is otherwise also bound to follow the law and more particularly the provisions of the Act read with the GDCR. It is not a matter where the demolition is to be made, but is a case where the use is to be prohibited. If the Market Committee is to use the constructed portion for other than wholesale market and if such other use is permitted under the law, it may make use for such a purpose. However, the permission granted for construction of vegetable market yard, which as found by this Court is for wholesale market, the same cannot be permitted on the face of the provisions of the Act read with GDCR.

At this stage, a reference may be made to the recent decision of the Apex Court in case of **M.C.MEHTA VS. UNION OF INDIA AND OTHERS**, reported at (2006) 3 Supreme Court Cases 399, where occasion arose for consideration of the

Apex Court for permitting the use of the property in contravention to the laws for regulating the building and the land use and the Apex Court *inter alia* emphasized for a need for complying with the implementation of the regulations/planning laws specifying the user of the land and at paragraph No.35, the Apex Court has *inter aila* observed as under:

> "..... The provisions of user may be regulatory but all the same, they are mandatory and binding. In fact, almost all the planning provisions are regulatory. The violations of the regulatory provisions on massive scale can result in plans becoming merely scraps of paper....."

The Apex Court further observed at paragraph No.53 *inter alia* as under:

> "Now, we revert to the task of implementation. Despite its difficulty, this Court cannot remain a mute spectator when the violations also affect the environment and healthy living of law-abiders. The enormity of the problem which, to a great extent, is the doing of the authorities themselves, does not mean that a beginning should not be made to set things right. If the entire misuser cannot be stopped at one point of time because of its extensive nature, then it has to be stopped in a phased manner, beginning with major violators. There has to be a will to do it. We have hereinbefore noted in brief the orders made in the last so many years but it seems the same has had no effect on the authorities. The things cannot be

permitted to go on in this manner forever. On one hand, various laws are enacted, master plans are prepared by expert planners, provision is made in the plans also to tackle the problem of existing unauthorised constructions and misusers and, on the other hand, such illegal activities go on unabated openly under the gaze of everyone, without having any respect and regard for law and other citizens. We have noticed above the complaints of some of the residents in respect of such illegalities. For the last number of years even the High Court has been expressing similar anguish in the orders made in large number of cases.....”

The Apex Court further observed at paragraph No.61 as under:

“If the laws are not enforced and the orders of the courts to enforce and implement the laws are ignored, the result can only be total lawlessness. It is, therefore, necessary to also identify and take appropriate action against the officers responsible for this state of affairs. Such blatant misuse of properties at large-scale cannot take place without connivance of the officers concerned. It is also a source of corruption. Therefore, action is also necessary to check corruption, nepotism and total apathy towards the rights of the citizens. Those who own the properties that are misused have also implied responsibility towards the hardship, inconvenience, suffering caused to the residents of the locality and injuries to third parties. It is, therefore, not only the question of

stopping the misuser but also making the owners at default accountable for the injuries caused to others."

Ultimately, the directions were issued by the Apex Court for applying seal to the residential premises being used for commercial purpose.

13. Therefore, considering the facts and circumstances, I find that it would not be a case to make a departure from the normal principles and enforcement of law, merely because respondent No.4 is a Market Committee, who if follows the law, will be able to maintain peace with and avoid alleged nuisance or pollution to the residents of the area. At the same time, if development or use of the property is permitted other then what is prohibited under GDCR, the same may be resorted to after following requisite procedure in accordance with law.

14. In view of the aforesaid observations and discussions, impugned permission by respondent No.2 and its confirmation thereof by the Collector and the State Government as per impugned orders dated 28.03.2005 and 26.08.2005 are quashed and set aside.

It is clarified that the present judgment shall not operate as a bar to the Market Committee to submit application for development by using the construction

already made or may be made which is expressly permitted under GDCR. However, it is further clarified that in the event such application is made by the Market Committee, opportunity of hearing shall also be given to the petitioner before any decision is taken by respondent No.2. The petition is allowed to the aforesaid extent. Rule is made absolute accordingly. No order as to cost.

(JAYANT PATEL, J.)

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